

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA,) Case 1:14-cr-00175
)
Plaintiff,)
)
v.) Alexandria, Virginia
) July 18, 2014
JAMES THOMAS McBRIDE,) 10:10 a.m.
)
Defendant.)
) Pages 1 - 13

TRANSCRIPT OF MOTIONS HEARING

BEFORE THE HONORABLE ANTHONY J. TRENGA

UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

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FOR THE DEFENDANT:

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COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

1 THE CLERK: Criminal Case 1:14-cr-175, *United*
2 *States of America v. James Thomas McBride*.

3 Will counsel please identify themselves for
4 the record.

5 MR. JOHNSTON: Good morning, Your Honor.
6 William Johnston and Kosta Stojilkovic for the United
7 States.

8 THE COURT: Good morning.

9 We're here on defendant's two motions. One
10 is for a stay. One is for a continuance. The Court
11 has reviewed the motion for stay. The Court is going
12 to deny that motion.

13 Mr. Zimmerman, would you like to speak to the
14 motion for a continuance?

15 MR. ZIMMERMAN: Your Honor, as the Court is
16 aware, I'm standby counsel.

17 THE COURT: I understand. I'm sure
18 Mr. McBride doesn't have any objection to your
19 addressing this issue.

20 (Mr. Zimmerman and Mr. McBride confer.)

21 MR. ZIMMERMAN: I would be happy to address
22 the Court, Your Honor.

23 THE COURT: All right.

24 MR. ZIMMERMAN: Your Honor, as the Court is
25 aware, this is a substantial case. This is a 16-page

1 indictment charging a conspiracy to defraud essentially
2 that lasted over a year.

3 Mr. McBride, at his initial appearance, the
4 detention hearing, expressed his desire to represent
5 himself, to exercise his *Faretta* right. I was brought
6 in to discuss this with him. Then at the detention
7 hearing, it was determined by Judge Davis that he could
8 exercise his *Faretta* right. I was kept on as standby
9 counsel.

10 THE COURT: You're familiar with the volume
11 of discovery that's been provided?

12 MR. ZIMMERMAN: I am, Your Honor.

13 THE COURT: In a general fashion?

14 MR. ZIMMERMAN: I'm sorry, Your Honor?

15 THE COURT: In a general fashion you are?

16 MR. ZIMMERMAN: In a general fashion, I am.
17 Although, frankly, this is my first time as standby
18 counsel. I think this is a pretty unusual arrangement.

19 We went to arraignment. The codefendant,
20 Sharyn Brown, had previously been arraigned and had set
21 the trial date, and it's a week from Monday. Then the
22 government has provided -- there was initial discovery
23 of about 3,500 pages plus recordings, about 60 hours
24 worth of jailhouse recordings. The documents were
25 provided to Mr. McBride.

1 The recordings, he doesn't really have an
2 ability to listen to those at the jail. The government
3 uses proprietary software that can be difficult to use.
4 We made arrangements with the U.S. Attorney's Office to
5 have him brought over. They had expressed initially a
6 desire to always have me present when Mr. McBride was
7 there, but that turned out to be unworkable. We've
8 simply upped the amount of time that he's spending over
9 there.

10 There's also a subsequent disclosure at our
11 request of all the e-mails that were subpoenaed from
12 his e-mail accounts. This is an additional 40,000
13 pages of e-mails. I've looked at it. I'd estimate
14 probably 10 percent of it is spam, diet pill ads. That
15 still leaves a substantial amount of e-mails to review.

16 The government makes a case in their
17 pleadings that they're only using one phone call and
18 that they are only using a discrete amount of
19 documents. But of course, we're entitled to review all
20 of them. It's Mr. McBride's contention that -- and a
21 reasonable one -- that there is significant exculpatory
22 evidence within the rest.

23 As the Court is aware, he had timely filed
24 some motions. In addition, there is evidence in
25 pending cases in South Carolina that we are working --

1 these are documents that were seized from him, boxes of
2 documents, as well as items relevant to the charges
3 that we've been working to get up here to him.

4 Essentially, Judge, there really -- the
5 government characterizes Mr. McBride's position as
6 obstructive, but it really hasn't been. He has a
7 nontraditional approach to his defense. He timely
8 filed his motions. He has been working diligently with
9 me and with the government to review evidence.

10 Once he spent a day at the U.S. Attorney's
11 Office meticulously going through these recordings,
12 taking notes, they realized that my presence wasn't
13 needed. He simply sits down and reviews the evidence.

14 I don't think the Court has seen him in court
15 and may get a chance today. He is simply trying to
16 defend himself. He is not trying to obstruct anything,
17 but the 53 days from arraignment from this federal case
18 to when he has to try it, we would just submit it just
19 isn't sufficient time to review all the evidence, to
20 discuss legal theories, to prepare the case.

21 Mr. McBride as *pro se* is going to have to run
22 the case. I will always be available as standby
23 counsel, but he needs to be familiar with the
24 procedures. We simply need some more time.

25 THE COURT: All right. Mr. McBride, since

1 you are representing yourself, I will give you an
2 opportunity to speak to this motion. Please don't
3 repeat what Mr. Zimmerman has told the Court, but I
4 will give you an opportunity to say what you'd like.

5 THE DEFENDANT: Thank you. Yes. From the
6 beginning, Mr. Zimmerman suggested that I file a motion
7 for a continuance. I told him that my intent was to
8 honor the Court's schedule. I have worked diligently
9 to, in fact, honor that. It just came to a point where
10 it became impossible. We just received a dump of
11 40,000 e-mails. In a cursory search of that, I found
12 that there was indeed some exculpatory evidence in
13 there. I was only able to view a little bit of the
14 first disk.

15 I know that there's evidence in South
16 Carolina that is very important to my case. We've been
17 trying to get access to that.

18 I apologize for the late motion for the
19 continuance. It's been my intent from the beginning to
20 honor the Court's schedule. I have been very diligent
21 at that. It just became impossible.

22 THE COURT: All right.

23 THE DEFENDANT: I think it would be in the
24 best interest of justice if you allow me the time to
25 prepare a fair and honorable defense.

1 THE COURT: All right. Thank you.

2 Counsel.

3 MR. JOHNSTON: Your Honor, the government
4 acknowledges that under many circumstances a *pro se*
5 incarcerated defendant would be entitled to some more
6 time to prepare for his defense. So the government
7 recognizes that the Court would take this motion
8 seriously even when filed so close to trial. We do not
9 believe that the defendant is entitled to more time,
10 nor do we believe that a continuance is in the interest
11 of justice.

12 There's a couple of preliminary points that
13 we would like to address that, I think, need to be
14 cleared up. First is the statement that the government
15 just recently produced 40,000 e-mails. We would just
16 like to bring some clarity to that. The United States
17 executed a number of search warrants on the defendant's
18 e-mail accounts. As the Court is aware, this follows a
19 two-step process where we ask that the e-mail provider
20 hand over the e-mails that pertain to the conduct
21 that's been investigated. But what most of the
22 providers do is just do a full dump. Then we're only
23 authorized to go in, inspect, and seize the portion of
24 it that's related to the search warrant itself.

25 So the 3,500 documents that were initially

1 turned over, those were the ones that were actually
2 seized by the government. The rest of them just so
3 happened to be in our possession because of the way
4 that the Internet provider conducts the search warrant
5 process. They don't go and analyze the terms to make
6 sure that they're only producing what's within the
7 scope of this search warrant.

8 The other point that we want to make is that
9 the government has made every accommodation possible.
10 The discovery was actually provided pre-arraignment.
11 The jail calls are -- you know, only half of them
12 actually can't be reviewed by standby counsel. These
13 came from two different jails in South Carolina and
14 Ohio. They relate to a period of prior incarceration
15 from the defendant. Most of the calls -- basically,
16 almost the entirety of the calls postdate the charged
17 conduct in the indictment, which is why the government
18 is only using one of the phone calls. Because all the
19 rest just have really no bearing on the case.

20 From the beginning, the government tried to
21 make sure that the defendant had every opportunity to
22 be able to review the evidence. When the defendant --
23 when we first received the request that he wants to
24 come to review a subsection of the recordings --
25 because there are two jail call sets, one from Ohio,

1 one from South Carolina. When we were informed that he
2 couldn't review the Ohio ones, we had him come over two
3 weeks ago. He came over for one day, and we would note
4 that the defendant left early beyond the allotted time.

5 When we were informed a week later that he
6 would like to come back. We set up immediately for
7 three days this week, Tuesday, Thursday, and --
8 Tuesday, Wednesday, and Thursday for the defendant to
9 come over and review the calls. He came over on
10 Tuesday and Wednesday, both days left early, and
11 canceled on Thursday.

12 So we think that to the extent he has not
13 been able to review the Ohio jail calls, it has been
14 perhaps due to a lack of diligence but certainly not
15 for a lack of accommodation on the part of the United
16 States in ensuring that he can prepare for trial.

17 The last point that we would make is that the
18 defendant's motions showed that he did have sufficient
19 time and opportunity to be able to pursue some defense.
20 And to the extent that those were unsuccessful and
21 meritless and now he decides that he actually wants to
22 engage the evidence, that shows that he has not been
23 diligent in preparing for his defense. If later in the
24 game you want to actually engage with the evidence,
25 that's not a basis for granting a continuance.

1 We make the final note that if the Court is
2 inclined to give the defendant a bit more time, a date
3 in early August would be acceptable to the government.

4 So under these circumstances, the government
5 believes that a continuance is not in the interest of
6 justice.

7 THE COURT: All right. Thank you.

8 Mr. Zimmerman.

9 MR. ZIMMERMAN: Just very briefly, Judge.

10 THE COURT: Yes.

11 MR. ZIMMERMAN: Just a few points. The fact
12 that a lot of calls relate to post-charged conduct -- I
13 mean, they're relevant. It is very typical in cases
14 which -- this is the reason they pull these calls,
15 actually. There are cases in which defendants say
16 things on the phone calls that inculcate them and they
17 want to use them, but there's also times when the
18 defendant -- their behavior post-conduct on those calls
19 exculpates them. They behave in a way on those calls
20 that's consistent with the defense. That's why the
21 government pulls those calls. That's why the
22 government produces those calls. So the fact that the
23 calls are after the conduct and some of it does relate
24 to that, they still must be reviewed.

25 Mr. McBride has been diligent. This really

1 isn't so much an issue of access to the evidence. It's
2 really an issue of volume of the evidence. The
3 government has been producing a lot of evidence. As
4 they point out, they have been producing it.

5 Mr. McBride, initially, when he gets into the
6 case, he has a very short motions deadline. So he
7 focuses on pretrial motions, on legal issues. He files
8 those. The government is sort of creating a catch-22
9 here. Because if Mr. McBride doesn't diligently file
10 motions, they say, well, he's not diligently filing
11 motions. If he does diligently file motions, they say,
12 well, obviously he's engaged in the process. He's just
13 not looking at the evidence. Well, he's taking it one
14 step at a time. He files the motions. He's
15 considering the evidence as well, and then he switches
16 on trial prep mode.

17 When he's brought over initially to the U.S.
18 Attorney's Office -- again, partially to accommodate my
19 schedule because they wanted me there -- he was fully
20 shackled, which includes having his arms in what's
21 called a black box to a waist chain. This made it
22 impossible for him to take notes. So there was a
23 procedure so that he could -- because he was *Faretta*,
24 because he was *pro se*, that he could review the
25 evidence. The government accommodated us, and we

1 worked together on this. But that sort of took an
2 afternoon. Then he has to get back to the jail in the
3 early afternoon.

4 At a certain point this week, he is switching
5 over his strategy from reviewing calls to getting ready
6 for this hearing. So at every stage he is just trying
7 to get ready. It's a lot of evidence. It's a lot of
8 law, and it's a serious indictment. He's simply
9 requesting some more time.

10 THE COURT: All right. Thank you.

11 The Court has reviewed the motion. There are
12 some unusual aspects to this case. Under all the
13 circumstances, the Court is going to grant the motion
14 and allow a short continuance. I'm going to continue
15 this case to August 11.

16 MR. ZIMMERMAN: If I may, Judge, I apologize.
17 I have a previously scheduled family vacation. I have
18 to be out of the country starting on the 14th to the
19 24th.

20 THE COURT: Of August?

21 MR. ZIMMERMAN: Of August.

22 THE COURT: That's fine. We'll proceed on
23 August 11. All right.

24 MR. ZIMMERMAN: All right.

25 THE COURT: Thank you.

1 MR. STOJILKOVIC: For the record, Your Honor,
2 we think the government's case will take a day, a day
3 and a half.

4 THE COURT: All right. Thank you.
5 Counsel is excused. The defendant is
6 remanded.

7 MR. ZIMMERMAN: Thank you, Judge.

8 -----
Time: 10:25 a.m.

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22 I certify that the foregoing is a true and
23 accurate transcription of my stenographic notes.

24

25

/s/
Rhonda F. Montgomery, CCR, RPR